IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2019 01926

NICOS ANDRIANAKIS — Plaintiff

v

UBER TECHNOLOGIES INC and others
(according to the attached schedule) — Defendants

JUDGE:	MACAULAY J
WHERE HELD:	Melbourne
DATE OF HEARING:	22 September 2021
DATE OF RULING:	12 November 2021
CASE MAY BE CITED AS:	Andrianakis v Uber Technologies (Ruling No 3)
MEDIUM NEUTRAL CITATION:	[2021] VSC 744

CIVIL PROCEDURE – Group proceeding – Appointment of sample group members – Object of group proceedings – Whether some issues involve hypothetical and advisory questions without sample group members – Whether appointments of sample group members facilitate efficient determination – *Matthews v SPI Electricity Pty Ltd (Ruling No 5)* (2012) 35 VR 615, *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27, *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3)* [2001] VSC 372, *Dillon v RBS Group (Australia) Pty Ltd & Ors* (2017) 252 FCR 150, *Brady v NULIS Nominees (Australia) Limited in its capacity as trustee of the MLC Super Fund* [2021] FCA 999 – *Supreme Court Act 1986*, s 33Q and s 33ZF.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms M Szydzik with Ms A Staker	Maurice Blackburn Lawyers
For the Defendant	Mr D Sulan with Ms A Campbell	Herbert Smith Freehills

HIS HONOUR:

Introduction

1 In 2019, Mr Nicos Andrianakis, a Victorian taxi licence holder, operator and driver, commenced a group proceeding on behalf of all other Victorian point to point passenger transport service owners, operators and drivers and on behalf of similar owners, operators and drivers in New South Wales, Queensland and Western Australia. The proceeding was brought against Uber Technologies Inc and six other entities within the Uber group of companies, five of which were incorporated in jurisdictions outside of Australia, following the establishment of the UberX ride-sharing service in Australia in 2014. The cause of action upon which Mr Andrianakis relies is the tort of conspiracy to injure by unlawful means.

2 One of the purposes of group proceedings under Part 4A of the *Supreme Court Act 1986* ('the Act'), is to enable the Court to resolve as many common issues as is practicable by virtue of the initial trial so as to obviate the necessity for separate trials of the other group members' claims.[1] In facilitating that object, the Court may appoint sample group members to enable the Court to make findings and give judgment in relation to claims of sample group members in circumstances where the claim by the representative plaintiff may not cover the claims of all group members.[2]

3 In this proceeding, it is common ground between the parties, and the Court, that the efficient trial of this group proceeding would be enhanced by the appointment of some additional sample group members to give evidence concerning their claims, in addition to the evidence to be given by the plaintiff, Mr Andrianakis. With the Court's encouragement, the parties attempted to, but ultimately did not agree on the appointment of sample group members. In this ruling, I give my reasons for preferring the defendants' proposal for the appointment of sample group members.

---

1 *Matthews v SPI Electricity Pty Ltd (Ruling No 5)* (2012) 35 VR 615, 617 [3] (J Forrest J) ('*Matthews*').

2 Ibid 617 [4], 620 [15] and [18] (J Forrest J); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3)* [2001] VSC 372, [32]-[33] (Gillard J).

Background and issue for determination

4 Central to the plaintiff's claim in this proceeding is the allegation that the defendants intended to establish UberX by unlawfully competing with existing licensed passenger transport businesses and, further, agreed to do so with the common intention of injuring the plaintiff and the group members. Although there are some differences between the allegations made in respect of the defendants' conduct across the four states, the essential allegations are adequately depicted, for present purposes, by reference to paragraphs 75A and 76 of the further amended statement of claim filed on 2 April 2020 (the 'FASOC'), relating to Mr Andrianakis and the Victorian industry group members:

> 75A. At all material times from at least April 2014 and throughout the Victorian Claim Period, the Uber Entities, other than Rasier Pacific, intended that the means by which UberX would be established and operate in Victoria would be by UberX Partners unlawfully competing with the Plaintiff, the Victorian Taxi Group Members and the Victorian Hire Car Group Members in contravention of:
>
> (a) s 158 of the Victorian Transport Act, as alleged in paragraph 69; and/or
>
> (b) s 165 of the Victorian Transport Act, as alleged in paragraph 71,as a result of which the Plaintiff, the Victorian Taxi Group Members and the Victorian Hire Car Group Members would suffer loss.
>
> **Particulars**
>
> The matters alleged in Part C and paragraphs 68 to 71 are referred to and relied on.
>
> 76. At all material times from at least April 2014 and throughout the Victorian Claim Period, the Uber Entities other than Rasier Pacific, agreed or combined with the common intention of injuring the Plaintiff, the Victorian Taxi Group Members and/or the Victorian Hire Car Group Members by establishing, promoting and operating UberX in Victoria by unlawful means, namely by the Uber Entities' complicity (howsoever described in the preceding paragraph 75) in the contraventions by UberX Partners:
>
> (a) of s 158(1) of the Victorian Transport Act, as alleged in paragraph 69; and/or
>
> (b) of s 165 of the Victorian Transport Act, as alleged in paragraph 71.
>
> **Particulars**

1. The agreement or combination is to be inferred from:

   (a) the facts and matters alleged in Parts B, C and D; and

   (b) the Uber Inc Prospectus, including at pp 54-55 and 62.

2. The agreement or combination was aimed at or directed to the Plaintiff, the Victorian Taxi Group Members and/or the Victorian Hire Car Group Members, as the means by which the Uber Entities other than Rasier Pacific intended to establish and operate UberX in Victoria was by UberX Partners unlawfully competing with the Plaintiff, the Victorian Taxi Group Members and the Victorian Hire Car Group Members and causing them loss as alleged in paragraph 75A, which was achieved by the illegal conduct of Uber Entities alleged in paragraph 73. By reason of the above the Uber entities, other than Rasier Pacific, had the common intention of injuring the Plaintiff, the Victorian Taxi Group Members and/or the Victorian Hire Car Group Members.

5 The definition of 'group members' in the FASOC has two limbs with one being the jurisdiction (Victoria, New South Wales, Queensland and Western Australia) and the other one being industry subgroups broadly split into taxi and hire car services. Group members are defined in paragraph 2 of the FASOC as follows:

> 2. This proceeding is commenced as a group proceeding pursuant to Part IVA of the Supreme Court Act 1986 (Vic) by the Plaintiff on his own behalf and on behalf of all persons who:
>
> (a) at any point in the period 1 April 2014 to 23 August 2017 (the Victorian Claim Period) were:
>
> (i) a taxi-cab licence holder;
>
> (ii) an accredited taxi-cab operator;
>
> (iii) an accredited taxi-cab driver; or
>
> (iv) an accredited provider of taxi-cab network services ; or
>
> (i)–(iv) above, the Victorian Taxi Group Members;
>
> (v) a hire car licence holder;
>
> (vi) a hire car operator; or
>
> (vii) an accredited hire car driver;
>
> (v)–(vii) above, the Victorian Hire Car Group Members;
>
> as defined in Item 1 of Schedule A to this statement of claim (together, the Victorian Group Members);

(b) at any point in the period 7 April 2014 and 18 December 2015 (the New South Wales Claim Period) were:

(i) a taxi-cab licence holder;

(ii) an accredited taxi-cab operator;

(iii) an authorised taxi-cab driver; or

(iv) an authorised taxi-cab network provider; or

(i)–(iv) above, the New South Wales Taxi Group Members;

(v) a private hire vehicle licence holder;

(vi) an accredited private hire vehicle operator; or

(vii) an authorised private hire vehicle driver;

(v)–(vii) above, the New South Wales Hire Car Group Members;

as defined in Item 2 of Schedule A to this statement of claim (together, the New South Wales Group Members);

(c) at any point in the period 17 April 2014 to 9 June 2017 (the Queensland Claim Period) were:

(i) a taxi service licence owner;

(ii) an accredited taxi service operator;

(iii) an authorised taxi driver; or

(iv) a taxi service administrator; or

(i)–(iv) above, the Queensland Taxi Group Members;

(v) a limousine service licence owner;

(vi) an accredited limousine service operator; or

(vii) an authorised limousine driver;

(v)–(vii) above, the Queensland Hire Car Group Members;

as defined in Item 3 of Schedule A to this statement of claim (together, the Queensland Group Members); and

(d) at any point in the period 10 October 2014 to 4 July 2016 (the Western Australian Claim Period) (with the Victorian Claim Period, New South Wales Claim Period and Queensland Claim Period, the Claim Period) were:

(i) a taxi plate holder;

(ia) a district taxi-car licence holder;

(ii) a taxi operator;

(iii) a taxi driver; or

(iv) a taxi dispatch service provider; or

(i)–(iv) above, the Western Australian Taxi Group Members;

(v) an omnibus licence holder;

(vi) an omnibus operator; or

(vii) an omnibus driver;

(v)–(vii) above, the Western Australian Hire Car Group Members;

as defined in Item 4 of Schedule A to this statement of claim (together, the Western Australian Group Members) (with the Victorian Group Members, New South Wales Group Members and Queensland Group Members, the Group Members).

6 This proceeding was filed on an 'open class' basis, with a registration process available to group members since late 2017. The plaintiff's solicitors maintain a database recording the names of registered group members and the industry segment/s of the point to point transport industry to which they belong. The database contains registered group members from each of the industry segments identified at paragraph 2 of the FASOC.

7 Under the order dated 16 June 2021, the plaintiff put forward a proposal to the defendants that an industry participant from each of New South Wales, Queensland and Western Australia be appointed as sample group members, and that each proposed sample group member file evidence in the form of a witness outline (as the plaintiff himself has done). Specifically, the plaintiff proposed that the representative plaintiffs in each of three protective proceedings that were filed in those three states during 2020[3] be appointed as the sample group members ('Proposed Sample Group Members').

8 The plaintiff is alleged to have been a Victorian taxi licence holder, taxi operator and

[3] *Stewart v Uber Technologies Incorporated & Ors* (S ECI 2020 03593) and *H.D. Andree & M. Andree (a partnership) v Uber Technologies Inc & Ors* (S ECI 2020 04787) were transferred from New South Wales and Queensland respectively to Victoria where they were stayed. *Rosengrave & Ors v Uber Technologies Incorporated & Ors* (CIV/2013/2020) was commenced and stayed in Western Australia.

taxi driver belonging to the industry segments identified at paragraph 2(a)(i), 2(a)(ii) and 2(a)(iii) of the FASOC. The Proposed Sample Group Members from the states other than Victoria belong to one or more of the industry segments identified at paragraphs 2(b)(i), 2(c)(i), 2(d)(i), 2(d)(ii) and 2(d)(iii) of the FASOC, that is to say, they are *also* a taxi licence holder, taxi operator and/or taxi driver. None are hire car licence holders, owners or drivers (or their interstate equivalents), nor is there a taxi network service provider represented among the Proposed Sample Group Members.

9 The defendants did not oppose the appointment of the Proposed Sample Group Members, but proposed that *additional* sample group members be appointed that represent each other type of industry participant, being a taxi network provider, a hire car licence holder, a hire car operator and a hire car driver ('Unrepresented Industry Subgroups'). The defendants did not propose that there be a sample group member for each of those categories from each of the four states. The defendants expected that as few as two or at most four sample group members would be needed in addition to those required for the plaintiff's proposal (depending on whether one, two or three individuals are required to provide suitable examples of the claims of a hire car licence holder, operator and driver).

10 Ultimately, the parties did not reach agreement on the appointment of sample group members.

11 It was not in dispute that the Court has the power to appoint sample group members under Part 4A of the Act by way of a case management tool. Such a tool is designed to facilitate the efficient determination of questions of fact or law at trial that have a degree of commonality or which give rise to issues in common between some or all group members, and which may not otherwise arise in relation to the plaintiff's claim.[4]

12 As to the common issues in this proceeding, paragraph 144 of the FASOC sets out the

---

4 *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 2)* [2020] FCA 1355, [17]-[21] (Gleeson J); *Johnson Tiles Pty Ltd* (n 2), [37], [48]-[51] (Gillard J); *Matthews* (n 1), 617 [4] (J Forrest J); *Brady v NULIS Nominees (Australia) Limited in its capacity as trustee of the MLC Super Fund* [2021] FCA 999, [17], [19]-[22], [26] (Markovic J) ('*Brady*'); *Dillon v RBS Group (Australia) Pty Ltd & Ors* (2017) 252 FCR 150, 163 [62] - 164 [66] (Lee J) ('*Dillon*').

questions of law or fact that are common to the claims of the plaintiff and each of the group members, being the 'Common Questions':

(a) whether the Uber Entities committed the acts and/or engaged in the conduct alleged in the Statement of Claim;

(b) whether the Uber Entities engaged in the strategy to compete with other Point to Point Passenger Transport Services and to recruit UberX Partners who did not satisfy the Compliance Requirements as alleged in the Statement of Claim;

(c) whether the UberX Partners, and/or the Uber Entities, committed the offences alleged in the Statement of Claim;

(d) whether the Uber Entities were complicit (howsoever described in each of the Australian States) in the commission of offences by the UberX Partners as alleged in the Statement of Claim;

(e) whether the Uber Entities entered into agreements or combinations as alleged in the Statement of Claim;

(f) whether the Uber Entities shared a common intention to injure the Plaintiff and Group Members as alleged in the Statement of Claim;

(g) whether the Uber Entities carried into effect the conspiracies as alleged in the Statement of Claim; and

(h) what are the principles for identifying and measuring losses suffered by the Plaintiff and Group Members as a result of the conspiracies as alleged in the Statement of Claim.

13 Broadly speaking, the plaintiff submitted that the appointment of the Proposed Sample Group Members along the jurisdictional divide between the group members rather than for each type of industry participant in each state would suffice as a case management tool for determining 'issues of commonality' between a subset of group members. Additionally, the plaintiff contended that the absence of any sample group member from the Unrepresented Industry Subgroups would not preclude the Court from determining issues of commonality that affect the group more broadly and, therefore, the additional cost of litigating the claims of such additional sample group members at the initial trial would be unnecessary and burdensome.

14 For their part, the defendants submitted that the appointment of sample group members from the Unrepresented Industry Subgroups would be practical and that their absence:

(a) would create a 'real risk' that the Court would not be able to answer the Common Questions in relation to the Unrepresented Industry Subgroups because the Court would be required to consider hypothetical or advisory issues not arising on the case of the plaintiff or the Proposed Sample Group Members; and

(b) no determination on substantive issues of breach, causation and loss that arise peculiarly in relation to each Unrepresented Industry Subgroup could be made at the initial hearing. Therefore, the efficacy of the initial hearing and prospects of settlement would be decreased and the likelihood of further litigation to determine the claims of such group members would increase.

15 After setting out relevant principles, it is convenient, therefore, that I consider the following questions:

(a) whether, in the absence of evidence from sample group members from the Unrepresented Industry Subgroups, the Court will be required to answer hypothetical and advisory questions; and

(b) whether considerations of efficiency regarding the determination of the Common Questions require the appointment of the sample group members from the Unrepresented Industry Subgroups.

Principles

16 Appointing sample group members to give evidence at the initial trial of the proceeding – sometimes referred to as 'accelerating' the trial of types of group members' claims[5] – is now a well-established procedure in the management of the trial of group proceedings. It is different to the appointment of a 'sub-group representative party' under s 33Q(2) of the Act, but the power is sometimes sourced in the more general power contained in s 33Q(1) to give directions for the determination of questions not common to all group members, and at other times in

5 *Dillon* (n 4) 163-4 [62] (Lee J).

the broad general power to make any order to ensure that justice is done provided in s 33ZF. The exercise of the Court's discretion to appoint sample group members, and if so, how many and which ones, turns on case management considerations and the circumstances in each proceeding,[6] and is guided by the object of group proceedings and interests of justice.[7]

17 The object of a group proceeding is to enable a substantial number of victims of an alleged wrong committed by the same wrongdoer to bring a group proceeding, pool their resources and use the Court's resources efficiently and expeditiously. By enabling the Court to determine as many common issues as practicable at the initial trial, the necessity for separate trials of other group members' claims will be obviated (or at least fewer or shorter trials will be necessary).[8] In *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* ('*Johnson Tiles*'), Gillard J held:

> In my opinion, it is important that the Court conducts group proceeding litigation in a practical manner and ensures that as many questions of law and fact having a degree of commonality are decided. Once the group proceeding is completed and if an individual claim is to proceed, the individual litigant has the benefit of findings of law or fact to assist him in obtaining relief. It follows that a group proceeding is not concerned with the complete cause of action of a claimant, in the sense that all elements of the cause of action and issues raised are determined in the proceeding.[9]

18 As expressed by Gillard J in the earlier ruling in *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3)*:

> … the Court should endeavour to decide as many common questions of fact and law in a group proceeding, to facilitate the outcome of the litigation. If some questions are only relevant to some group members and not all, or to one group and not the other, so be it. As long as it may have some substantial practical effect in the determination of the litigation, one of the objects of group litigation is achieved.
>
> It follows that, in my opinion, the plaintiffs are entitled to call, as witnesses, any member of a group in order to adduce evidence which is relevant to any issue raised …[10]

---

6 *Dillon* (n 4) 164 [66] (Lee J).
7 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3)* (n 2), [32] and [33] (Gillard J).
8 *Matthews* (n 1), 617 [3] (J Forrest J).
9 [2003] VSC 27, [41] and [42] (Gillard J).
10 [2001] VSC 372, [49]–[51] (Gillard J).

19 In considering *Johnson Tiles*, J Forrest J in *Matthews v SPI Electricity Pty Ltd (Ruling No 5)* set out that:

> In practice, notwithstanding that there may be a commonality in the alleged cause of the harm occasioned to the group members, a trial focusing solely on the representative plaintiff's claim may not cover the claims of all group members.
>
> To address this problem, a practice has developed to permit other group members to give evidence at trial as to relevant facts concerning his or her claim. This evidence then enables the court to make findings and give judgement in relation to those other claims, which enables binding determinations to be made in respect of most, if not all, group members.[11]

20 In *Earglow Pty Ltd v Newcrest Mining Ltd & Ors*,[12] Beach J referred to the utility of adopting this expedient where there may be significant differences in the liability cases of individual claimants, aside from causation and damages issues. Noting this, Lee J in *Dillon v RBS Group (Australia) Pty Ltd & Ors* ('*Dillon*') commented as follows:

> What this approach demonstrates is the flexibility which the extensive case management powers in ss 33ZF and 37P provide for the efficient management of class actions. I said at the outset of these reasons that the expression an "initial trial of common issues" is a misnomer. This is because experience demonstrates that in many cases of quite different types of class actions, the Court has found it expedient to not only deal with the claim of the representative applicant at the initial trial but also with common questions (properly so called) and also questions which have utility in resolving aspects of the claims of a subset of the group members, which, to adapt Gillard J's phrase, may be called *issues of commonality*.
>
> An individual claim of one or other group member may provide an efficient way of dealing with these *issues of commonality*. The acceleration of the claim of a group member might not be necessary, depending upon the circumstances … Findings as to contravening conduct at later periods (which may be irrelevant to the applicant's liability or damages claim) are not abstract or hypothetical (and hence constitute an improper exercise of Ch III judicial power) provided the Court is satisfied that the relevant determination of an issue or finding of fact is material to a determination of claims of at least some identifiable group members. Accordingly, assuming the proviso exists, it is a question of utility, discretion and case management considerations (and not a question of power) as to whether the Court determines a particular issue or makes a relevant finding of fact at the initial trial.[13]

21 At times, courts have also paid regard to the fiduciary duty owed by a representative plaintiff to group members to conduct the proceeding in a way that is consistent with

---

11 (2012) 35 VR 616, 617 [4] (J Forrest J).
12 (2015) 230 FCR 469, 483 [55] – 485 [66] (Beach J).
13 *Dillon* (n 4) 164 [66] and 165 [67] (Lee J) (emphasis in original).

the interests of group members.[14] The defendants submitted that such a duty may extend to requiring the representative plaintiff to take steps necessary to maximise the possibility of the initial trial determining as many questions as possible common to group members or a subset of group members.[15]

22 With this brief overview, I will now turn to the two issues and the effect that the absence of sample group members from the Unrepresented Industry Subgroups or the appointment of sample group members in accordance with the defendants' proposal may have.

Will the Court be required to answer hypothetical and advisory questions?

23 Where there is a risk of a question being hypothetical or advisory in the particular circumstances of the case, '[t]hat risk can be easily alleviated by the appointment of a sample group member'.[16] Alternatively, a number of single judges, see for example the quote at para [20] from Lee J in *Dillon*, have held that there may be circumstances in which the Court may determine common issues or issues of commonality even in the absence of evidence from sample group members subject to the Court being satisfied that the findings it would make would not be abstract or hypothetical.[17]

24 By reference to the Common Questions in paragraph 144(f) and (h) of the FASOC, the defendants submitted that if the Court only appointed the Proposed Sample Group Members there would be at least two hypothetical or advisory questions, being 'common intention' and 'causation and loss' as those questions apply to the Unrepresented Industry Subgroups. More particularly, the defendants argued:

(a) Common intention/liability: Evidence in relation to common intention to injure the Proposed Sample Group Members would not enable the Court to draw conclusions regarding the alleged common intention to injure the Unrepresented Industry Subgroups. A central allegation made in the FASOC

---

14 *Dyczynski & Anor v Gibson & Anor* [2020] FCAFC 120, [209]-[210] (Murphy and Colvin JJ).
15 *Brady* (n 4), [28] (Markovic J).
16 Ibid [24] (Markovic J).
17 *Dillon* (n 4) 164 [66] and 164-5 [67] (Lee J); *Kamasaee v Commonwealth (No 10)* [2017] VSC 272, [78] (McDonald J).

is that the defendants established and operated UberX intending that the 'UberX Partners'[18] would unlawfully compete with the group members and cause them to suffer loss. The nature and extent of competition will depend on the nature of the respective industry participants and will be different for the Proposed Sample Group Members and the Unrepresented Industry Subgroups. Even if the plaintiff could establish that the defendants intended UberX Partners to compete with taxi drivers, such an intention to compete with hire car drivers, operators or licence holders would not follow because hire car drivers could exploit the Uber Black service to increase their customer base and revenue. Equally, common intention would not follow in relation to taxi network service providers as they did not provide ride services to passengers but acted as a form of taxi booking company or depot. Therefore, there would be at least a real risk that the question of the defendants' alleged common intention to injure group members other than taxi drivers, operators and licence holders would remain hypothetical and advisory. Additionally, it would be inefficient and costly for any experts appearing at the initial trial to give evidence regarding the taxi industry to have to return for another or several other trials at different times to deal with evidence relating to taxi service network providers and the hire car industry.

(b) Causation and loss: The principles for identifying and measuring losses suffered by the plaintiff and the group members as a result of the alleged conspiracies would differ depending on the nature of the respective industry participants, their operations and income streams, e.g. see *Brady v NULIS Nominees (Australia) Limited in its capacity as trustee of the MLC Super Fund*[19] ('*Brady*'). Focusing only on the plaintiff and the Proposed Sample Group Members, the principles of causation and loss would be confined to being determined in the context of taxi licence holders, operators and drivers. In arguing that the proposed Common Question in paragraph 144(h) of the

[18] As defined in paragraph 25 of the FASOC.
[19] [2021] FCA 999 (Markovic J).

FASOC could not be answered, the defendants contended that:

(i) hire car drivers were users of the Uber Black application, which enabled them to generate additional revenue and increase their client base. Therefore, some hire car drivers may not have suffered any loss, so that the effect of any revenue earned through Uber Black requires determination;

(ii) the nature and causes for any decline in the value of taxi licences, and the applicable regulatory regimes, were distinct from that of hire car licences, e.g., as opposed to taxi licences, hire car licences were available on demand for a set price; and

(iii) taxi network service providers have a different income stream from taxi drivers as taxi network service providers act as a form of taxi booking company or platform and earn fixed annual fees payable by taxi operators.

(c) Generally: the risk of the questions being hypothetical or advisory could be alleviated by appointing sample group members from the Unrepresented Industry Subgroups. The mere fact of the existence of group members from each industry subgroup would not assist the Court in determining the Common Question in respect of those claims. Ultimately, however, rather than making a finding whether or not any such questions would be hypothetical or advisory, the focus could and should be on case management principles. Preferably, the Court should avoid the risk that, at the initial trial, the Court either cannot determine issues in relation to the network providers and/or the hire car industry because of an absence of evidence, or the Court proceeds to determine such issues but its determinations are later considered as hypothetical due to a lack of concrete facts on which the Court's decision was based.

25 The plaintiff submitted that:

(a) Generally: Because evidence was led that registered group members representing each type of industry participant under paragraph 2 of the FASOC *exist*, findings in respect of the Unrepresented Industry Subgroups would therefore not be hypothetical. As stated by Lee J in *Dillon,* courts may make factual determinations which do not squarely arise from the plaintiff's claim, but are issues of commonality, so that 'the acceleration of the claim of a group member might not be necessary, depending upon the circumstances'.[20]

(b) Common intention/liability: For the purposes of establishing liability, the plaintiff would have to establish *intention* to compete as a relevant aspect of the claim of alleged conspiracy. The nature and extent of competition would be relevant to causation and loss, but would not be required to establish liability. The issue of common intention concerns the defendants' state of mind and conduct and is not a matter that group members can give evidence on. Instead, the plaintiff intends to lead evidence from an industry expert and an economist providing an analysis of the market and competition within the market. Based on such expert evidence, the Court could make determinations in relation to the common issues that arise in respect of hire car industry participants and taxi network providers even in absence of such sample group members. In this case, the approach taken in *Moore v Scenic Tours Pty Ltd*[21] and in *Kamasaee v Commonwealth (No 10)*[22] is instructive and should be applied.

(c) Causation and loss: Findings about causation and loss could be made with some aspects being state-based while others will be individual to different group members. Whether or not the introduction of UberX in each of the states expanded the market for point to point transportation is an example of a state-based determination the Court will be called upon to make. By contrast, whether a respective group member did in fact suffer loss, and how much, is a

---

20 *Dillon* (n 4) 164-5 [67] (Lee J).
21 [2015] NSWSC 1777 (Beech-Jones J).
22 [2017] VSC 272, [78] (McDonald J).

determination specific to individual group members. Evidence directed to the causation and quantification of an individual group member's loss would not establish the 'nature and extent' of UberX's competition regarding other group members in the same industry segment. Therefore, making the appointment of sample group members based on industry subgroups is, in these circumstances, unnecessary.

(d) As for taxi network providers, all operating taxis had to be affiliated with a taxi booking company, meaning there was no separate market for taxi network service providers and questions regarding taxi network service providers will arise in the context of taxi drivers, operators and licence holders.

Will the initial trial efficiently determine common issues with only the Proposed Sample Group Members?

26 The plaintiff argued that the utility of appointing any sample group members must be weighed against the cost or delay to the trial that any such appointments might cause.[23] While asserting the appointment of any sample group members was strictly speaking unnecessary, the plaintiff nevertheless proposed the appointment of sample group members from each of the relevant states to facilitate the determination of state-specific issues, such as findings about the launch and operation of UberX and the different regulatory regimes. To minimise costs, as noted, the plaintiff proposed the appointment of the representative plaintiffs in the protective proceedings in New South Wales, Queensland and Western Australia as sample group members.

27 The defendants contended that by adopting their proposal, the parties would reap the advantages they had identified with little additional cost or delay because:

(a) the proceeding has not yet been listed for trial,[24] discovery is still being undertaken and the plaintiff has not yet served any lay evidence from sample group members;

---

23 *Dillon* (n 4) 164-5 [67] (Lee J); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27, [42] (Gillard J).

24 Since submissions were made, the Court has provided the parties with an indicative trial date of July 2023.

(b) the plaintiff can readily identify suitable sample group members through its registration database;

(c) given that under the defendants' proposal, there would only be two to four group members added to the Proposed Sample Group Members (making it a total of five to seven sample group members), the cost and length of the initial trial would likely be similar under either proposal; and

(d) resolving as many common issues of fact and law as practicable would likely significantly reduce the delay and costs associated with the claims of the group members of the Unrepresented Industry Subgroups. If the initial trial determines only the claims in relation to some industry subgroups and another one or more full trials would have to be run, the costs incurred in dealing with trials 'in tranches' would far outweigh the costs of including a few more sample group members at the initial trial.

28 In relation to taxi network service providers, the plaintiff argued that the proportion of taxi network service providers compared to other industry subgroups is very small so that a cost benefit analysis would weigh against appointing a sample group member for taxi network service providers, especially as their loss would be specific to them and of remote utility to other industry subgroups. Additionally, the plaintiff argued that preparing a witness outline for taxi network service providers would be 'vastly more involved' and specific to them.

29 Noting that the plaintiff has pleaded its case including network service providers, the defendants argued that the plaintiff should be required to provide evidence to the Court to enable the Court to make some findings in relation to that industry subgroup as there would otherwise be a 'big gap' in the case.

30 In relation to hire car licence holders, operator and drivers, the plaintiff again contended that they form a smaller subgroup than any of the taxi subgroups, so that there would not be sufficient utility in appointing a sample group member from that any of the hire car subgroups. In response, the defendants pointed out that, on the

evidence available, there were 2,681 hire car licensees in 2012 (compared to 3,550 taxi licence holders).

31 Lastly, the plaintiff argued that, overall, the defendants' proposal delivered less benefit than the plaintiff's proposal. Further, the plaintiff argued that the fact that the defendants had effectively conceded that, under their proposal, it was not necessary to appoint additional sample group members by reference to the different states so as to avoid the determination of hypothetical or advisory questions, even less was there any need to appoint them by reference to the industry subgroups. In answer, the defendants explained that their reasoning behind not requiring one industry sample group member from each state was that the plaintiff's proposal already covered the different regulatory regimes for each state. On the defendants' argument, the market and competition would not differ so much by reference to the jurisdiction but by reference to the respective industry subgroups.

Analysis

32 It is important to remind oneself that what is being debated here is the appropriate exercise of a judicial discretion concerning the management of the trial of a proceeding. Notwithstanding the very many helpful illustrations of the exercise of this discretionary power contained in other cases, in the end, as Lee J said in *Dillon*, the acceleration of the claim of a group member (by allowing a sample group member's claim to be tried with the plaintiff's claim) may or may not be necessary (perhaps more appropriately, 'expedient'), *depending on the circumstances*.

33 In the context of this group proceeding, it is difficult to imagine that any decision to either appoint or not appoint a sample group member – or one batch or another batch of sample group members – could be 'wrong'. The decision will have consequences and an overly cautious decision may be productive of some delay and extra cost, in one direction, or an overly robust decision may be productive of some duplication and extra cost in the other. But any decision will be a matter of value judgment necessarily made at a time when perfect judgment is impossible.

34 A decision to appoint sample group members ideally should be made at a relatively early stage to enable evidence to be gathered and discovery given in a timely way. The earlier the decision, however, the more difficult it will be to assess whether and to what extent the trial of a particular sample group member's claim will be efficacious in the context of the whole group proceeding. Undoubtedly, such a decision will involve a trade-off: that is, a trade-off between the risk that a trial without the sample group member's evidence might lessen the value of the body of findings made for the benefit of the wider group against the risk that the value of the additional findings will turn out to be low and the cost of obtaining them relatively high.

35 Acknowledging those factors, I am however reasonably well satisfied that the efficient conduct of this group proceeding will be enhanced if the Court is able to make findings in respect of the claims of a hire car licence holder, hire car operator, hire car driver and a taxi network provider. In reaching that conclusion, I am particularly influenced by the consideration that the markets for those industry subgroups are likely to be sufficiently distinct from the markets for taxi licence holders, operators and drivers such that the nature of competition in the former markets could be materially different from the latter.

36 Importantly, an analysis of the nature of those different markets might lead to different conclusions about the impact on market participants of the introduction of UberX and the availability of Uber Black. Those different conclusions about the predictable impact of UberX (or Uber Black) upon competition within those different markets might in turn lead to different inferences being drawn about the probable intentions of the defendants toward the relevant market participants when establishing UberX in the four Australian states. To the extent that the plaintiff argued otherwise, I disagree with that submission.

37 I accept that calling individual hire car operators to give evidence about their individual experiences will not, of itself, produce evidence about the intention of the defendants when entering any particular market. I even accept that an industry expert may be able to give an opinion about the impact of the entry of UberX into a market

to facilitate the drawing of inferences (if any may be drawn) as to the defendants' intentions at the relevant time. Further, the fact that there is evidence that members of the so-called Unrepresented Industry Subgroups actually exist would probably mean that any determinations made by the Court on issues common to those subgroup members would not be either hypothetical or merely advisory.

38 Nevertheless, I consider that it will assist the trial process to have a specific claim for each of the four categories of group members proposed by the defendants litigated to conclusion to give concrete focus to the particular nuances and characteristics of those group members' claims. Their claims will provide that realistic focus not only for the issues of causation and loss, but also for the defendants' alleged intentions toward specific target sub-groups relevant to liability for the cause of action of conspiracy to injure. Given that those additional claimants will not exceed four, it is unlikely that the cost of litigating their claims will be disproportionate to the likely benefit of doing so.

39 I further agree with the defendants that the best balance between having as many issues of commonality decided at the initial trial stage without causing undue expenditure of cost is achieved by only appointing sample group members for each Unrepresented Industry Subgroup without also appointing such sample group members for each of the four states. I am strengthened in that view because the Proposed Sample Group Members' claims will provide appropriate focus for findings about the operation of the regulatory environment in each state.

Conclusion and orders

40 For these reasons, I will order, in substance, that:

(a) Mr Peter Stewart, the partnership H.D. Andree and M. Andree (a partnership), and Mr Peter Rosengrave each be appointed as a sample group member and that their claims be determined at trial;

(b) By [date], the plaintiff notify the defendants of the following sample group members whose claims will also be determined at trial:

(i) a taxi network provider;

(ii) a hire car licence holder;

(iii) a hire car operator; and

(iv) a hire car driver.

(c) By [date], the plaintiff file and serve any evidence of any sample group member on which he intends to rely.

41 The parties should prepare an appropriate form of order to give effect to these conclusions.

CERTIFICATE

I certify that this and the 19 preceding pages are a true copy of the reasons for Ruling of Justice Macaulay of the Supreme Court of Victoria delivered on 12 November 2021.

DATED this twelfth day of November 2021.

SUPREME COURT OF VICTORIA
Associate of a Judge of the Court

L Juares

Associate

SCHEDULE OF PARTIES

S ECI 2019 01926

BETWEEN:

NICOS ANDRIANAKIS	Plaintiff
- and -	
UBER TECHNOLOGIES INCORPORATED (4849283)	First Defendant
UBER INTERNATIONAL HOLDING B.V. (RSIN 851 929 357)	Second Defendant
UBER B.V. (RSIN 852 071 589)	Third Defendant
UBER AUSTRALIA PTY LTD (ACN 160 299 865)	Fourth Defendant
RASIER OPERATIONS B.V. (RSIN 853 682 318)	Fifth Defendant
UBER PACIFIC HOLDINGS B.V. (RSIN 855 779 330)	Sixth Defendant
UBER PACIFIC HOLDINGS PTY LTD (ACN 609 590 463)	Seventh Defendant